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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. [redacted] 1[redacted] 1

HARRY BRIDGES,

Petitioner,

vs.

STATE OF CALIFORNIA.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

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OCTOBER TERM, 1939.
No. 759.

HARRY BRIDGES,

Petitioner,

vs.

STATE OF CALIFORNIA.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Preliminary Statement.

The title of this proceeding is incorrect. The State of California is not properly named as respondent, for contempt is not a criminal proceeding under the state law.[1] The Attorney General of the State has refused to appear, for no service has been made upon him in accordance with Rule 38.[2]

The Bridges contempt proceeding has been prosecuted by a committee of the Los Angeles Bar Association on behalf of the Superior Court under formal appointment of the court [R. 49] and in conjunction with the County Counsel of Los Angeles County who has also appeared pursuant to statute[3] and request of the court.

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[1]See Supreme Court opinion at R. 139-145.

[2]See affidavit of Attorney General Earl Warren attached hereto and bound herein.

[3]Cal. Pol. Code, Sec. 4153, Subd. 9.

As the petition, record and brief, together with notice of filing, were served upon the members of the committee, who made written acknowledgment of service thereof without observing the substitution of a new respondent, we are content to treat the title of the proceeding as erroneous and to present this brief on behalf of the real respondent.

I.

The Instant Petition Presents No Federal Question.

What Constitutes Contempt Is a Matter of Local Law.

The California Constitution provides in section 9, Article I:

> "Every citizen may freely speak, write, and publish his sentiments on all subjects, *being responsible for the abuse of that right*;[1] and no law shall be passed to restrain or abridge the liberty of speech or of the press. * * *"

The California Supreme Court in its opinion in this case said, at R. 159:

> 'It may be conceded that all that has been said in these briefs as to the importance of the right of free speech and of a free press in a democracy meets with the approval of this court. In fact, we are in thorough accord with petitioner's claim that the right of free speech and of a free press are among the greatest bulwarks of the freedom which, as citizens of this country, we enjoy. But as was said in a recent decision of the Supreme Court of the United States, 'the right (of free speech) is not an absolute one, and the

[1]All italics ours, unless otherwise indicated.

> State in the exercise of its police power may punish the abuse of this freedom.' (Stromberg v. California, 283 U. S. 359, 368.)"

And it found upon the facts presented that there had been *an abuse of that right* by petitioner. [R. 156, 159.]

The ultimate and essential claim of petitioner is that fundamental rights have been denied him by holdings of two state courts that the facts at bar measure up to the standard of contempt which has been announced, accepted and applied as the state law for many years past,[1]—a criterion which happens to correspond to the one heretofore adopted by this court.[2] And petitioner would have this court first reverse itself and then hold that the state court had denied due process or equal protection of the laws[3] because it applied the standard of guilt which has prevailed in the California courts and in the United States tribunals since the formation of the state and federal governments, respectively.

This contention, for several reasons, presents no federal question of any substantiality. In the first place it ignores the sovereign power of the state and the restricted nature of the grant of powers to the United States. It is well settled that each state may set up its own body of juris-

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[1] *In re San Francisco Chronicle*, 1 Cal. (2d) 630, 637; *In re Shuler*, 210 Cal. 377, 402; *In re Lindsley*, 75 Cal. App. 122, 124; *Lindsley v. Superior Court*, 76 Cal. App. 419, 428.

[2] *Toledo Newspaper Co. v. U. S.*, 247 U. S. 402, 421; *Near v. State of Minnesota*, 283 U. S. 697, 715; *Sinclair v. U. S.* 749, 764.

[3] It is the Fourteenth Amendment, not the First, that affords protection against state denial of freedom of the press or freedom of speech. *Near v. Minnesota*, 283 U. S. 697, 707.

prudence, whether it be the civil law, the common law, or a hybrid form such as is exemplified by the community property system in the common law state of California.[1] In *Erie R. Co. v. Tompkins*, 304 U. S. 64, 78, this court recently said:

> "And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts."

Quoting Mr. Justice Field, it was further said that the Constitution of the United States:

> "'* * * recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specially authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence,'"

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[1]See *Missouri v. Lewis*, 101 U. S. 22, 31; dissent of Mr. Justice Brandeis in *Truax v. Corrigan*, 257 U. S. at 372-74.

and quoting Mr. Justice Holmes:

> " 'The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else. * * *
>
> " '* * * the authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word.' "

The state may define crimes or lawful conduct as it sees fit.[1]

The powers of its own courts are within its exclusive keeping, not subject to federal control.[2]

The substantive law of the state is binding upon this court in all types of cases, subject only to the narrow exception of "matters governed by the federal Constitution or by acts of Congress."[3]

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[1]See *Shevlin-Carpenter Co. v. Minnesota*, 218 U. S. 57, 67-69; *Powell v. Pennsylvania*, 127 U. S. 678.

[2]*Missouri v. Lewis*, 101 U. S. 22; *Cincinnati Street Railway Co. v. Snell*, 193 U. S. 30, 36; *Tumey v. State of Ohio*, 273 U. S. 510, 534; *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U. S. 511, 517; *Truax v. Corrigan*, 257 U. S. at 373-4, dissenting opinion.

[3]*Erie R. Co. v. Tompkins*, 304 U. S. at 78.

Application of Fourteenth Amendment to Contempt.

For the purposes of this case, the only limitation upon the foregoing propositions is the requirement that due process of law or equal protection of the laws must not be denied. But "the 14th amendment does not, in guaranteeing equal protection of the laws, assure uniformity of judicial decisions * * * any more than, in guaranteeing due process, it assures immunity from judicial error * * *." (*Milwaukee, etc. Co. v. Wisconsin ex rel. Milwaukee*, 252 U. S. at 106.)[1]

To determine what is due process in contempt proceedings we must look, of course, to the standards which were recognized at the time of adoption of the federal Constitution.[2] Such investigation discloses that, as the power is an inherent one, necessary to the independence of each court,[3] the demands of due process are met by adequate notice of hearing and opportunity to be heard,[4] both of which requisites were manifestly present here.

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[1]See, also, *Riley v. Worcester County Trust Co.*, 89 Fed. (2d) 59, 66.

[2]*Eilenbecker v. District Court*, 134 U. S. 31, 38; *Tumey v. State of Ohio*, 273 U. S. at 523.

[3]*Michaelson v. U. S.*, 266 U. S. 42, 65; *Myers v. U. S.*, 264 U. S. 95, 103; *Ex parte Robinson*, 86 U. S. 505, 510.

[4]*Cooke v. U. S.*, 267 U. S. 517, 537; *Blackmer v. U. S.*, 284 U. S. 421, 440; *Eilenbecker v. District Court*, 134 U. S. 31, 39; *Ex parte Savin*, 131 U. S. 267, 278; *U. S. v. Moore*, 287 Fed. 879, 883, certiorari denied in 264 U. S. 581.

The proceeding was initiated by order to show cause on February 24, 1938, followed by two like orders which it was impossible to serve [R. 31]. Finally it went to trial upon an order to show cause made on May 24, 1938 [R. 32]. Petitioner interposed a motion to quash in July, 1938 [R. 32-39]; he likewise demurred [R. 40] and answered [R. 41]. The demurrer was sustained as to the first charge on August 16th [R. 49, 137]. A trial upon the facts was had on September 6, 7, 12 and 13, 1938 [R. 49], and petitioner Bridges testified in his own behalf [R. 108]. The trial judge on the 13th rendered his decision [R. 43] exonerating Bridges of the charge of the third count [R. 50] and adjudging as to the second count that "the defendant Harry R. Bridges has unlawfully interfered with the proceedings of this court, and he is guilty of contempt of court." [R. 52.] A petition for writ of review having been filed in the Supreme Court of California, same was denied on December 1, 1938 [R. 126], but upon petition for rehearing that ruling was vacated and the writ was issued on December 29, 1938 [R. 126]. The matter was then carefully considered upon the arguments and briefs presented to the Supreme Court and also in the light of the arguments made in the case of *Times-Mirror Company v. Superior Court* [R. 161]. It was finally decided on October 16, 1939 [R. 136].

So far as equal protection of the law is concerned it appears from the petition herein that the Times-Mirror Company has had the same result in a cause which petitioner claims to present substantially the same questions

as at bar (*Times-Mirror Publishing Co. v. Superior Court*, 99 Cal. Dec. 102, 98 Pac. (2d) 1029). Even if it were to be conceded that there was error in the application of the state law to the facts at bar, that would not raise a constitutional question for, as said in the *Milwaukee* case, *supra*, the 14th Amendment does not "assure uniformity of judicial decisions" or "immunity from judicial error". In *Bell Telephone Co. v. Pennsylvania P. U. Commission*, 84 L. Ed. (Adv. Op.) 412, this court said:

> "In the absence of other constitutional objections, it cannot be said that a state court denies due process when on appropriate hearing it determines that there is evidence to sustain a finding of the violation of the state law with respect to the conduct of local affairs. The contention that such a decision is erroneous does not present a federal question."

Patterson v. Colorado Is Controlling.

The question now presented—whether a finding of contempt of the state court presents a federal question—was specifically decided by this court in *Patterson v. Colorado*, 205 U. S. 454. That case dealt with a contempt by publication in a newspaper. A writ of error to review the conviction in the state court was dismissed for want of jurisdiction, this court speaking through Mr. Justice Holmes. The decision proceeded upon the postulate that "The only question for this court is the power of the state" (p. 460); and the court said in part:

> "There is no constitutional right to have all general propositions of law once adopted remain unchanged.

Even if it be true, as the plaintiff in error says, that the supreme court of Colorado departed from earlier and well-established precedents to meet the exigencies of this case, whatever might be thought of the justice or wisdom of such a step, the Constitution of the United States is not infringed. It is unnecessary to lay down an absolute rule beyond the possibility of exception. Exceptions have been held to exist. But, in general, the decision of a court upon a question of law, however wrong and however contrary to previous decisions, is not an infraction of the 14th Amendment merely because it is wrong or because earlier decisions are reversed.

"It is argued that the articles did not constitute a contempt. * * * However, it is enough for us to say that they are far from showing that innocent conduct has been laid hold of *as an arbitrary pretense for an arbitrary punishment.* Supposing that such a case would give the plaintiff in error a standing here, *anything short of that is for the state court to decide. What constitutes contempt,* as well as the time during which it may be committed, *is a matter of local law.*"

Again at page 463:

"It only remains to add that the plaintiff in error had his day in court and opportunity to be heard. We have scrutinized the case, but cannot say that it shows an infraction of rights under the Constitution of the United States, or discloses more than the formal appeal to that instrument in the answer to found the jurisdiction of this court."

To the same effect see:

Newport Light Co. v. City of Newport, 151 U. S. 527;

Owen v. Dancy, 36 Fed. (2d) 882, 884;

Gasquet v. Lapeyre, 242 U. S. 367, 369.

Viewing the instant proceeding in the light of the *Patterson* decision, it should first be noted that the contempt was committed with reference to a matter pending before Judge Schmidt but the charges were heard by Judge Bishop [R. 50, 52, 56]. Certainly the rulings of the trial judge exonerating petitioner of two of the three charges, and his restrained and considerate expression of views in connection with the finding of guilty on the other [R. 44-48], cannot be said to approach the laying hold upon "innocent conduct * * * as an arbitrary pretense for an arbitrary punishment". And no more can the procedure in the Supreme Court be so characterized. The granting of a rehearing and issuance of a writ of review after same had been once denied, its long deliberation upon the case (from December, 1938 to October, 1939), its study of same in connection with the similar case of the *Times-Mirror Company*, all lead to but one conclusion, that petitioner had at every stage of the cause the utmost consideration and that he was finally convicted only after mature and dispassionate deliberation. The conviction of the Times-Mirror Company in the same type of cause and through application of the same "reasonable tendency" test is conclusive proof that the state laws have been applied equally. And as for notice and opportunity to be heard, the record speaks in no uncertain terms.

Finality of Contempt Judgment Is Essential to Independence of Contemned Court.

And the *Patterson* decision is obviously sound for a certiorari would first review the findings of the state courts upon questions of fact and state law and, if decided favorably to petitioner, would impose upon them the judgment of this tribunal as to what constitutes contempt of the courts created by and functioning under the laws of the sovereign state of California,—thus impairing their inherent power and duty of self-protection.

Ex parte Kearney, 7 Wheat. 38, 44:

"The sole adjudication of contempt, and the punishment thereof, belongs exclusively, and without interfering to each respective court. Infinite confusion and disorder would follow if courts could, by writs of habeas corpus, examine and determine the contempt of others."

Bessette v. W. B. Conkey Co., 194 U. S. 324, 330:

"At common law it was undoubted that no court reviewed the proceedings of another court in contempt matters. In Crosby's Case, 3 Wils. 188, Mr. Justice Blackstone said:

" 'The sole adjudication of contempts, and the punishment thereof, in any manner, belongs exclusively, and without interfering, to each respective court.' "

Ex parte Fisk, 113 U. S. 713, 718:

"There can be no doubt of the proposition, that the exercise of the power of punishment for contempt of their orders, by courts of general jurisdiction, is not subject to review by writ of error, or appeal to

this court. Nor is there, in the system of federal jurisprudence, any relief against such orders, when the court has authority to make them, except through the court making the order, or possibly by the exercise of the pardoning power.

"This principle has been uniformly held to be necessary to the protection of the court from insults and oppressions while in the ordinary exercise of its duties, and to enable it to enforce its judgments and orders necessary to the due administration of law and the protection of the rights of suitors."

Re Debs, 158 U. S. 564, 595:

"And this is no technical rule. In order that a court may compel obedience to its orders, it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency."

And this is the law in California. An adjudication of contempt is reviewable in an appellate court only to the extent of determining whether the evidence supporting the judgment is sufficiently substantial to sustain the jurisdictional finding [see opinion herein at R. 152-153].

Whether the Superior Court of Los Angeles County and the Supreme Court of California have misapplied the law to the facts is not for this court to say, for that is not a federal question.

II.

The "Clear and Present Danger" Doctrine Is Not Applicable to Contempt.

Even if this court could properly review the intrinsic merit of the state law of contempt and, through reversing itself, impose a new law upon the State of California, there would be no good ground for so doing.

There Is a Manifest Distinction Between Abridging Free Speech and Punishing Its Abuse.

The cases upon which petitioner relies[1] are in no instance concerned with contempt of court. They deal with statutory *abridgments* of free speech, not with subsequent punishments for *abuses* of that right, such as the recognized instances of libel, slander and contempt.

Near v. State of Minnesota, 283 U. S. 697, 708:

> "Liberty of speech and of the press is also not an absolute right, and the state may punish its abuse. Whitney v. California, 274 U. S. 357, 362, 373, 71 L. Ed. 1095, 1100, 1105, 47 S. Ct. 641, *supra*; Stromberg v. California (283 U. S. 359, *ante*, 1117, 73 A. L. R. 1484, 51 S. Ct. 532), *supra*. Liberty, in each of its phases, has its history and connotation and, in the present instance, the inquiry is as to the historic conception of the liberty of the press and whether the statute under review violates the essential attributes of that liberty."

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[1] *Schenck v. U. S.*, 249 U. S. 52; *Abrams v. U. S.*, 250 U. S. 616; *Gitlow v. N. Y.*, 268 U. S. 652; *Whitney v. California*, 274 U. S. 357; *DeJonge v. Oregon*, 299 U. S. 353; *Herndon v. Lowry*, 301 U. S. 242; and *Lovell v. Griffin*, 303 U. S. 444.

At page 713:

> "The question is whether a statute authorizing such proceedings in restraint of publication is *consistent with the conception of the liberty of the press as historically conceived and guaranteed.*"

Considering the matter in its historical aspect, the court further said, at page 715:

> "But it is recognized that punishment for the *abuse* of the liberty accorded to the press is essential to the protection of the public, and that the common law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our constitutions. *Id.* pp. 883, 884. The law of criminal libel rests upon that secure foundation. *There is also the conceded authority of courts to punish for contempt when publications directly tend to prevent the proper discharge of judicial functions.* Patterson v. Colorado, 205 U. S. 454, 51 L. Ed. 879, 27 S. Ct. 556, 10 Ann. Cas. 689; Toledo Newspaper Co. v. United States, 247 U. S. 402, 419, 62 L. Ed. 1186, 1193, 38 S. Ct. 560."

And at page 720:

> "Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege."

The principles announced in the *Near* case are impliedly recognized in all of the "clear and present danger" pronouncements upon which petitioner relies.

Gitlow v. New York, 268 U. S. at 666:

> "It is a fundamental principle, long established, that the freedom of speech and of the press which is

secured by the Constitution does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language, and prevents the punishment of those who abuse this freedom. (Citing 10 authorities.) Reasonably limited, it was said by Story in the passage cited, this freedom is an inestimable privilege in a free government; without such limitation, it might become the scourge of the Republic.

"That a state, in the exercise of its police power, may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question. (Citing 9 authorities.)"

Mr. Justice Brandeis in his concurring opinion in *Whitney v. California*, 274 U. S. at 373, said:

"But, although the rights of free speech and assembly are fundamental, they are not in their nature absolute."

And Mr. Justice Holmes, in *Schenck v. U. S.* (249 U. S. at 52) said:

"But the character of every act depends upon the circumstances in which it is done * * * The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre, and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force."

The Clear and Present Danger Doctrine Was Not Designed for Application to Contempt.

Petitioner makes no claim that this doctrine which he now advocates has been applied by this court or any other to contempt proceedings. And it is significant that the justices of this court who evolved and insisted upon its application to abridgements of free expression of political or like views, made no attempt to extend the doctrine to contempt proceedings but actually joined in decisions which, by adopting the reasonable tendency standard, operated to exclude it.

Toledo Newspaper Co. v. U. S., 247 U. S. 402, was decided in 1918, and, in the face of a dissent by Mr. Justice Holmes and Mr. Justice Brandeis, it adopted and applied the reasonable tendency test. The dissenting justices made no attempt to inject the clear and present danger doctrine, and contented themselves with a discussion of the proper construction of the pertinent federal statute. This new doctrine was first brought forward in the *Schenck* case (249 U. S. 52) decided at the next term. Although one or both of these justices pressed the doctrine for application in the *Abrams*, *Gitlow* and *Whitney* cases (decided in 1919, 1925, and 1927, respectively), they concurred in the decision of *Sinclair v. U. S.*, 279 U. S. 749 (decided in 1929), which again reiterated and applied to a contempt proceeding the *Toledo Newspaper Co.* rule that "the situation is controlled by the reasonable tendencies of the acts done and not by extreme and substantially impossible assumptions on the subject", which rule is again phrased at page 764 as follows:

> "But here again not the influence upon the mind of the particular judge is the criterion, but the reason-

able tendency of the acts done to influence or bring about the baleful result is the test. In other words, having regard to the powers conferred, to the protection of society, to the honest and fair administration of justice and to the evil to come from its obstruction, the wrong depends upon the tendency of the acts to accomplish this result without reference to the consideration of how far they may have been without influence in a particular case."

This doctrine was adopted at the instance of Mr. Justice Roberts, who then appeared as counsel for the United States and successfully urged the affirmance of the conviction, relying largely upon the *Toledo Newspaper Company* case.

Moreover, Mr. Justice Roberts, who spoke for the court in applying the clear and present danger rule in *Herndon v. Lowry*, delivered at the same term the opinion in *Associated Press v. National Labor Relations Board*, 301 U. S. 103, 131-133, wherein he rejected the contention that the National Labor Relations Act as applied to the Associated Press was in restraint of freedom of the press, and said in part:

"Does this statute, as applied to the petitioner, abridge the freedom of speech or of the press safeguarded by the first amendment? We hold that it does not. * * * The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. He must answer for libel. He may be punished for contempt of Court."

In support of the foregoing statement there is cited only the case of *Toledo Newspaper Co. v. United States*. And Mr. Chief Justice Hughes, Mr. Justice Brandeis, Mr. Justice Stone and Mr. Justice Cardozo joined in forming a majority of the court in that instance.

The True Purport of the Doctrine.

The clear and present danger doctrine, as stated from time to time, has called for an imminent danger of overthrow of organized government. For instance, Mr. Justice Holmes, dissenting in the *Abrams* case, said (250 U. S. at 630):

> "I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."

And in *Gitlow v. New York*, Mr. Justice Holmes and Mr. Justice Brandeis (268 U. S. at 673) said:

> "If what I think the correct test is applied, it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who share the defendants' views,"

and

> "If the publication of this document had been laid as an attempt to induce an uprising against government at once, and not at some indefinite time in the future, it would have presented a different question."

If the doctrine were applied in this extreme sense to contempt proceedings it would result absurdly, for successful

influence of one judge or two judges or a dozen judges would have no direct and immediate tendency to destroy the government as a whole. Not until the great majority of the judges had been subjected to the will of a Bridges or a Los Angeles Times would the foundations of the republic or of the sovereign state of California be in imminent danger of destruction, and hence there could be no contempt until the court in its entirety, or in its greater part, had been robbed of its independence through extraneous influences.

The Doctrine, as Advanced by Petitioner, Is Not Essentially Different From the Reasonable Tendency Rule.

Petitioner no longer relies upon the extreme statement of the doctrine. He now rests upon Mr. Justice Brandeis' statement in the *Whitney* case:

> "That the necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent has been settled." (Petitioner's Brief, p. 14.)

And petitioner's brief shows that the doctrine as applied to contempt distills itself into the same thing as the reasonable tendency doctrine against which counsel for petitioner inveigh. Under this statement of the rule there is necessary to lawful restraint of speech only "a clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent." And at pages 14-15 of his brief petitioner points out that "the courts have the authority and the obligation to safeguard themselves from * * * outside influences concerning pending cases;"

and that "Interferences with the judiciary admittedly constitute 'substantive evils' which the courts may constitutionally penalize." Clearly then protection against "outside influences concerning pending cases" is the thing against which the state, through its courts, may protect itself whenever there appears "a clear and imminent danger" of such influences being brought to bear upon such pending cases. We have then a question of fact as to whether "a clear and imminent danger" of influencing the court exists (according to petitioner's test) as opposed to a question of fact whether the extraneous influence has a "reasonable tendency" to effect that result. And, as Mr. Justice Holmes said in the *Schenck* case, "It is a question of proximity and degree." The court there held that the evidence was sufficient to justify the lower federal court in finding that the defendant's act did create "a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent" and in so doing stressed the "tendency" of the documents in question to influence others to obstruct the recruiting service of the army. (See pages 51-52.)

It is interesting to note that the *amicus curiae* brief of American Civil Liberties Union herein suggests that the appropriate criterion is "a *reasonable apprehension* that the independence of the judiciary was being challenged by the comment complained of" (p. 4) and that "it should be necessary to find a *strong probability* that interference would result from the act charged before punishment is meted out" (p. 4). Commenting upon *Craig v. Hecht*, 263 U. S. 255, it is further said in effect, at page 6, that the court there recognized the impropriety of comment upon pending cases "when it is quite clear that the comment has a *direct tendency* to obstruct."

Either Doctrine Presents a Mere Question of Fact.

Mr. Justice Brandeis in the *Whitney* case, advocating the application of the clear and present danger doctrine, says that (274 U. S. at 374):

> "This court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present; and what degree of evil shall be deemed sufficiently substantial to justify resort to abridgment of free speech and assembly as the means of protection."

In any event, the question of whether the requisite "clear and imminent danger" is present is one of fact for the trial court to determine. And its existence is inherent in the finding of Judge Bishop, the trial judge, at R. 52:

> "That the statements contained in said telegram, and the publication of the fact of the sending of said telegram, and the publication of the contents thereof, all as aforesaid, were in and of themselves calculated, and had, an inherent tendency to interfere with the orderly and due administration of justice in said action No. 420356, and to interfere with, influence, sway, and control the proceedings in said action, and to embarrass and influence the actions and decisions of the judge before whom said action was pending."

And the conclusion deduced therefrom was that:

> "by reason of the foregoing acts, the defendant Harry R. Bridges has unlawfully interfered with the proceedings of this court, and he is guilty of contempt of court."

As Mr. Justice Brandeis (Mr. Justice Holmes concurring) pointed out in the *Whitney* case, there is no fixed standard for determination of the existence of "a clear and imminent danger" and the matter must be determined as one of fact in the trial court. In that instance these concurring justices held that, notwithstanding the erroneous reasoning of the trial judge, his ultimate finding was sustained by competent evidence and hence should be affirmed. At pages 378-9 it was said:

> "Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature. The legislative declaration, like the fact that the statute was passed and was sustained by the highest court of the state, creates merely a rebuttable presumption that these conditions have been satisfied."

And:

> "On the other hand, there was evidence on which the court or jury might have found that such danger existed. * * * In the present case, however, there was other testimony which *tended* to establish the existence of a conspiracy, on the part of members of the International Workers of the World, to commit present serious crimes; and likewise to show that such a conspiracy would be furthered by the activity

> of the society of which Miss Whitney was a member. Under these circumstances the judgment of the state court cannot be disturbed."

We again quote the American Civil Liberties Union:

> "But the problem cannot be solved by the application of any precise formula of words. Much will depend on the temper of the comment under scrutiny and the setting in which it was uttered." (P. 6.)

Whether we apply the test of reasonable tendency to interfere with judicial proceedings or clear and imminent danger of interference therewith, we have a question of fact presented in each contempt proceeding and it is, we submit, competent for the court to conclude that a publication which has the specified tendency also presents clear and imminent danger "of some substantive evil which the state constitutionally may seek to prevent." As applied to contempt, petitioner's clear and present danger doctrine possesses nothing of substance different from the criterion laid down in the *Toledo Newspaper* case, the *Sinclair* case, and in the State of California.

Herndon v. Lowry Does Not Support Petitioner's Position.

The claim that the reasonable tendency doctrine was rejected by *Herndon v. Lowry* as too vague a criterion of guilt is not well founded. What was there said related to an argument of counsel that "reasonable tendency" should be read into the vague statute under consideration, which had been so construed by the state court as to set at large the objective of the "dangerous tendency" suggested by counsel. At page 256 the court stressed the fact that "The legislation under review differs radically from the espionage acts in that it does not deal with a wilful at-

tempt to obstruct a described and defined activity of the government." In view of the state court's construction of the statute it further said, at page 261:

> "The Act does not prohibit incitement to violent interference with any given activity or operation of the state. By force of it, as construed, the judge and jury trying an alleged offender cannot appraise the circumstances and character of the defendant's utterances or activities as begetting a clear and present danger of forcible obstruction of a particular state function. Nor is any specified conduct or utterance of the accused made an offense."

Reasonable Tendency Is a Common Law Standard, Not a Newly Created Criterion of Guilt.

More important, however, is the fact that the court was discussing legislation which provided a new measure of guilt and not one which incorporated a recognized common law standard of conduct. The decision differentiates such cases as *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, and *Nash v. U. S.*, 229 U. S. 373, saying:

> "The decisions relied on by the state held the Sherman law furnished a reasonable standard of guilt because it made a standard long recognized by the common law the statutory test." (page 263.)

And reliance was placed upon *U. S. v. L. Cohen Grocery Co.*, 255 U. S. 81, wherein the court, at page 92, said:

> "Indeed, the distinction between the cases relied upon and those establishing the general principle to which we have referred, and which we now apply and uphold as a matter of reason and authority, is so clearly pointed out in decided cases that we deem it only necessary to cite them."

and cited among others, *International Harvester Co. v. Kentucky*, 234 U. S. 216. Mr. Justice Holmes, speaking for the court in that instance said at page 223:

> "We regard this decision as consistent with Nash v. United States, 229 U. S. 373, 377, 57 L. ed. 1232, 1235, 33 Sup. Ct. Rep. 780, in which it was held that a criminal law is not unconstitutional merely because it throws upon men the risk of rightly estimating a matter of degree—what is an undue restraint of trade. That deals with the actual, not with an imaginary condition other than the facts. It goes no further than to recognize that, as with negligence, between the two extremes of the obviously illegal and the plainly lawful there is a gradual approach, and that the complexity of life makes it impossible to draw a line in advance without an artificial simplification that would be unjust. The conditions are as permanent as anything human, and a great body of precedents on the civil side, coupled with familiar practice, make it comparatively easy for common sense to keep to what is safe."

The distinction between new statutory tests and settled common law criteria was again drawn by Mr. Chief Justice Taft in *Cline v. Frink Dairy Co.*, 274 U. S. 445, 459. He said:

> "'The precise point of differentiation in some instances is not easy of statement. But it will be enough for present purposes to say generally that the decisions of the court upholding statutes as sufficiently certain rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them. Hygrade Provision Co. v. Sherman, 266 U. S. 497, 502, 69 L. ed. 402, 407, 45 Sup. Ct. Rep. 141; Omaechevarria v.

> Idaho, 246 U. S. 343, 348, 62 L. ed. 763, 767, 38 Sup. Ct. Rep. 323, *or a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ.* Nash v. United States, 229 U. S. 373, 376, 57 L. ed. 1232, 1235, 33 Sup. Ct. Rep. 780; International Harvester Co. v. Kentucky, 234 U. S. 223, 58 L. ed. 1288, 34 Sup. Ct. Rep. 853, or, as broadly stated by Mr. Chief Justice White in United States v. L. Cohen Grocery Co., 255 U. S. 81, 92, 65 L. ed. 516, 522, 14 A. L. R. 1045, 41 Sup. Ct. Rep. 298, "that for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded." ' "

The reasonable tendency test is the ancient common law standard applicable to contempt of court and, to quote the *International Harvester* case, "a great body of precedents on the civil side, coupled with familiar practice, make it comparatively easy for common sense to keep to what is safe." The *Herndon* case, dealing with a statutory definition of guilt, does not support petitioner's contention that reasonable tendency to influence the court is not the proper test of unlawfulness of utterances concerning pending causes.[1]

And it should not be forgotten that whatever may be the accepted test of guilt, the existence of a clear and present danger is a question of fact just as is the claim of a reasonable tendency to influence the court. The one test is as flexible as the other and the question always one of fact, as recognized in the concurring opinion in the *Whitney* case.

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[1]See in this connection, *Minnesota ex rel. Pearson v. Probate Court of Ramsey County*, 84 L. Ed. (Adv. Op.) 477, 479-480.

III.

Actual Obstruction of the Court Processes Is Not an Acceptable Test of Contempt.

Judge Bishop found that there was not only an inherent tendency in the Bridges publication "to interfere with, influence, sway and control the proceedings in said action, and to embarrass and influence the actions and decisions of the judge before whom said action was pending" but also that Bridges had, by that publication, "unlawfully interfered with the proceedings of this court." [R. 52.] If actual obstruction were of the essence, this finding of the trier of the facts would conclude the matter.

Counsel for petitioner are mistaken in their assertion that Justices Holmes and Brandeis entertained the views expressed by Mr. Justice Gibson in the *Times-Mirror* case. For the opinion in the *Schenck* case[1] says:

> "If the act (speaking, or circulating a paper), its tendency and the intent with which it is done, are the same, we perceive no ground for saying that success alone warrants making the act a crime."

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[1]249 U. S. at 52.

IV.

Petitioner Has Not Been Denied His Constitutional Right to Petition the Government for a Redress of Grievances.

The Supreme Court of California adequately disposed of this contention in its opinion [R. 160] when it said:

> "Petitioner further contends that the sending and publication of said telegram by him as a labor official to the Secretary of Labor respecting labor matters is protected by the [fol. 150] constitutional guarantee to engage in a lawful occupation. We thoroughly agree with petitioner that the sending of a telegram to the Secretary of Labor was within his constitutional rights, and one might go further and hold that it was within his duties as the executive head of the union affected by the decision of Judge Schmidt to inform the Secretary of Labor of said decision, but he was not charged nor punished for the sending of the telegram. *It was the publication of the telegram in the manner hereinbefore set forth, and not the sending of it, that constituted the offense of which he was found guilty.*"

Moreover, there is no factual basis for the contention that the telegram to Secretary Perkins was a petition for redress of grievances. The whole of the communication is not in evidence, it was not produced. That fact was adverted to in the oral opinion of the trial judge [R. 44, 46]. The portion received in evidence is quoted at R. 51. It bears no resemblance to a petition to the Federal government, only a threat to the state court. Petitioner Bridges was

not subject to subpoena or compulsory testimony (*Ex parte Gould*, 99 Cal. 360), but, having voluntarily taken the stand in his own behalf [R.108], he was subject to the same inferences as any other party or witness who testifies to but a part of his knowledge of the facts or produces but part of the relevant instruments within his exclusive custody. Bridges' failure to produce the entire telegram raises the inference, and necessitated a finding, that the same was not a petition for redress.[1]

But if it be assumed that the telegram was a petition for redress presented to the Secretary of Labor, that would not establish its innocuousness. Petitioner cites no authority, and we believe there is none, to the effect that one has a constitutional right to petition the executive department for redress against judicial action in a pending cause wherein the prescribed method of redress for error, the process of appeal, has not been exhausted. The constitutional method of petitioning for redress of judicial error is perfecting and prosecution of an appeal. It is only after conviction in a criminal case that the executive can function with respect to a court judgment; and he never has or acquires that right in civil causes.

Manifestly, the Secretary of Labor could have no proper function to perform with respect to the then pending cause of *Walker v. International Longshoremen's Association*, and the publication of the communication to her

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[1]See *Caminetti v. U. S.*, 242 U. S. 470, 492-4; *Raffel v. U. S.*, 271 U. S. 494, 497.

(whatever it may have been) could have had no real purpose other than to communicate Mr. Bridges' views to the trial judge. The historic conception of the right of petition and of the necessity for independent courts does not permit this sort of extraneous control of the judicial process.

Counsel concede "that there are limits to the exercise of this right, as to all rights, constitutional or otherwise." (Pet. p. 19.) And it seems to be established law that, though one may freely petition the legislative or executive branch for redress of wrongs, he nevertheless is responsible by way of libel or otherwise for charges made in such petition.[1] Which merely means that the petitioner is responsible for abuses of the conceded right, just as in the case of free speech or free press.

The contention that a right to petition for redress applies to action in a pending lawsuit was expressly rejected by the Supreme Court of Wisconsin (*In re Stolen*, 193 Wis. 602, 631, 633). The court said in part:

> "The right of petition, natural and inherent though it be, has never, so far as we can discover, been invoked to shatter the standards of propriety entertained for the conduct of courts. Throughout many centuries the right of petition has been recognized, but it has never been considered that a court may be properly approached by a petition to make a specific disposition of a cause pending before it. While our

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[1]See *Vanarsdale v. Laverty*, 69 Pa. St. 103, 109; *McKee v. U. S.*, 133 Tenn. 455, 460-461.

state Constitution protects and preserves the right of petition, it is the right as it was known and exercised at the time of the adoption of the Constitution. That right shall never be abridged. That right, however, never included the right to attempt to influence the decision of a court through the medium of a petition.
* * *

"Before closing our discussion on this subject, it may be well to refer to the fact that the Constitution guarantees liberty of speech as well as liberty of petition. While there seems to be no recorded case of an attempt to influence the court by petition, there are plenty of cases in which such attempts have been made through the columns of the press. This is generally held to be an abuse rather than an exercise of the right of free speech, and it is well settled that such efforts to influence the course of justice constitute contempt of court. 6 R. C. L. 508 et seq. The right of petition is no more sacred than the right of free speech, and, as there may be an abuse of the right of free speech, so may there be an abuse of the right of petition. Any attempt to influence the courts of justice constitutes an abuse of either right."

V.

The Right of Petitioner to Pursue a Lawful Occupation Has Not Been Denied or Impaired.

The Supreme Court of California adequately disposed of this contention in the language quoted in Point IV from R. 160.

The rights of a labor leader are no higher than those of the newspapers or others relying upon constitutional guaranties. This court denied any superior rights to newspaper publishers in the Associated Press case, from which we have quoted, *supra*. And the California Supreme Court reiterated in *Times-Mirror Co. v. Superior Court*, 99 Cal. Dec. 102, 119 (98 Pac (2d) at 1038) what it had previously said in the *Shuler* case:

> "No difference can be discerned between the rights of the citizen and the proper limitation thereof under his aforesaid constitutional guaranty, whether that citizen be a minister speaking from his pulpit, or a broadcaster through the radio, or an editor through his newspaper, or a curbstone orator * * * or an anarchist * * * the right and the limitation thereof being the same when the matter involved in the utterances of all or any of these affects or manifestly tends to affect the orderly administration of justice in pending causes before judicial tribunals and the judges thereof."

Contempt of court by a labor leader is a contempt of court as much as any other. The exercise of his prerogatives can no more be used to influence the disposition of pending causes than can the "freedom of the press" of the Los Angeles Times.

VI.

Petitioner Has No Right to a Review of the Evidence Herein.

It may be conceded that this court will review the finding of facts of a state court where a federal right has been denied as the result of a finding shown by the record to be without any evidence to support it. But no such federal question is presented here and it cannot be created by mere asseveration. In the *Patterson* case, *supra*, it was "urged that the articles did not constitute a contempt." But the court refused to review that matter saying:

> "However, it is enough for us to say that they are far from showing that innocent conduct has been laid hold of as an arbitrary pretense for an arbitrary punishment. Supposing that such a case would give the plaintiff in error a standing here, anything short of that is for the state court to decide. *What constitutes contempt, as well as the time during which it may be committed, is a matter of local law.*"

There must be some semblance of substance to the claim of denial of federal right before an examination of the evidence will be made by this court. Even if such an examination were to disclose that the findings of the two state courts are not supported by the evidence, the situation presented would be merely an erroneous application of the state law to the facts. A mistaken interpretation of state law does not raise a federal question.

Before one can be found in the case at bar this court must reverse its decisions in the Colorado and Toledo newspaper cases, impose a new concept of contempt upon the State of California and with respect to the state courts, and then hold that because of the new ruling the Bridges publication could not constitute an abuse of the conceded right of free speech. This it will not do, for such action would recreate and enlarge the ancient prerogative of free speech and *pro tanto* impair the sovereignty of the State of California.

It should also be observed that under the guise of a contention that there is no evidence to support the judgment, counsel for petitioner actually seek a reweighing of the inferences drawn by the two state courts from that evidence [concerning which see R. 43-48, 51-52, 153-160]. That this court will not, even in the face of claim of denial of federal rights, undertake to review conflicting evidence or inferences therefrom and to substitute its judgment for that of the state court, seems well settled.[1]

We submit, without further elaboration, that this court, if it undertook such a reexamination of the facts, would find that the evidence and the reasonable inferences therefrom abundantly support the findings of fact of the trial court, which were approved by the Supreme Court of California.

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[1]See Robertson and Kirkham on Jurisprudence of the Supreme Court of the United States, §90, p. 178, §101, p. 183.

It is submitted that no good ground for certiorari has been shown, and that the writ should be denied.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939
No. 759

HARRY BRIDGES,
Petitioner,
vs.
STATE OF CALIFORNIA.

AFFIDAVIT

STATE OF CALIFORNIA,)
) ss.
CITY AND COUNTY OF SAN FRANCISCO)

EARL WARREN, being duly sworn, deposes and says:

Affiant is the duly elected qualified and acting Attorney General of the State of California, and the person duly appointed by the law of said State to appear for and represent said State as legal counsel in actions and proceedings in which said State is a party. No copy of the Petition for writ of certiorari in the above entitled matter or proceeding, nor any copy of any notice of the filing of said Petition or of any Petition therein, or of any printed record or supporting brief in relation thereto, has been served on said affiant.

EARL WARREN.

Subscribed and sworn to before me this 23rd day of March, 1940.

(Seal) GEO. K. WHITWORTH,
Deputy Clerk, Supreme Court, State of California.